

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellee,

vs.

KENNETH A. LOWDEN,
Appellant.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court
for the District of Oregon.

HENRY L. HESS,
United States Attorney for the District of Oregon,
FLOYD D. HAMILTON,
Assistant United States Attorney,
JOHN R. BROOKE,
Assistant United States Attorney,
506 United States Courthouse,
Portland, Oregon,
Attorneys for Appellee.

LEROY L. LOMAX,
629 Builders Exchange Building,
Portland, Oregon,
Attorney for Appellant.

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ISSUES INVOLVED

1. Is the rule of statutory construction of ejusdem generis applicable to Section 495, Title 18, U.S.C.A.
2. Must instant indictment set out one of those instruments specifically enumerated in the statute creating the offense charged to state facts sufficient to constitute a crime.

APPELLEE'S ANSWER TO ISSUES INVOLVED

ISSUE NO. I

The doctrine of statutory construction of ejusdem generis is not applicable to Title 18, Section 495, U.S. C.A.

Prussian v. United States, 282 U.S. 675, 51 S. Ct. 223 and 75 L. Ed. 610.

Pina v. United States (C.C.A. 9th, 1948), 165 F. 2d 890.

Head v. Hunter (C.C.A. 10th, 1944), 141 F. 2d 449.

Johnson v. Warden (C.C.A. 9th, 1943), 134 F. 2d 166.

Goldsmith v. United States (C.C.A. 2d, 1930), 42 F. 2d 133.

United States v. Raskin (D.C.N.Y., 1943), 52 Fed. Supp. 343.

United States v. Mullin (D.C.Mo., 1943), 51 Fed. Supp. 785.

Argument

Appellant contends the doctrine of statutory construction of ejusdem generis is applicable to Section 495, Title 18, U.S.C.A. In support of this position appellant calls to the attention of the Court:

United States v. Dressler, 112 F. 2d 972.

United States v. Parker, 103 F. 2d 857.

United States v. Gooch, 297 U.S. 124.

Each of these cases considers the applicability of the ejusdem generis doctrine to the federal statute commonly known as the "Lindbergh Act," Section 1201, Title 18, U.S.C.A. For that reason appellant's cases are not in point. But even so, appellant's cases find the Courts refusing to apply the ejusdem generis doctrine to the kidnapping statute. The discussion by the Court of the ejusdem generis doctrine is especially interesting in *United States v. Gooch*, 297 U.S. 124, p. 128:

"The rule of ejusdem generis, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation. And, while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view."

In support of a negative answer to Issue No. I, appellee believes *Prussian v. United States* is most persuasive. That case involved the forerunner of the very statute under consideration and decided the very point in issue with the following language, 282 U.S. 675, at p. 679:

"But we think the indictment is to be sustained as charging an offense under Sec. 29 of the Criminal Code, which punishes the forgery of 'any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving . . . from the United States, or any of their officers or agents, any sum of money.' The indictment alleges specifically and with certainty the forgery of the endorsement on the draft, for the

purpose of obtaining a sum of money from the Treasurer of the United States, and charges a violation of § 29. We think the endorsement was a 'writing' within that section. Its language is 'comprehensive' and 'all-embracing.' Cf. *United States v. Davis*, 231 U.S. 183, 188. The writings enumerated have no common characteristic from which a purpose may be inferred to restrict the statute to any particular class of writings. The addition of 'other writing' to the enumeration was therefore not for the purpose of including writings of a limited class, but rather of extending the penal provisions of the statute to all writings of every class if forged for the purpose of obtaining money from an officer of the United States. See *Howgate v. United States*, 7 App. D.C. 217, 232, 233; cf. *United States v. Lawrence*, 13 Blatch. 211."

A companion statute, Section 494, Title 18, U.S.C.A., to the statute upon which the indictment in this appeal is founded has been the subject of several adjudicated cases wherein the applicability of the doctrine of ejusdem generis appeared.

Section 494 of Title 18, U.S.C.A., supra, protects against forgeries of any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit or other writing.

In *Pina v. United States* (C.C.A. 9th, 1948), 165 F. 2d 890, p. 894, this Court held that Sections 72 and 73 of Title 18, U.S.C.A., 1940 ed., the forerunners of Sections 494 and 495, were companion statutes and "identical canons of construction, therefore, can properly be applied to both." Therefore, it would appear that adjudicated cases discussing the applicability of the ejusdem generis doctrine to Section 72 (Section 494, Title

18, U.S.C.A.), supra, are proper authorities in support of appellee's position.

Those cases hold the words "or other writing" to include any written instrument used to defraud the United States. "The legislative preoccupation was with a result, rather than with the means by which it might be accomplished."

United States v. Raskin (D.C.N.Y., 1943), 52 Fed. Supp. 343.

Head v. Hunter (C.C.A. 10th, 1944), 141 F. 2d 449.

Johnson v. Warden (C.C.A. 9th, 1943), 134 F. 2d 166.

Goldsmith v. United States (C.C.A. 2d, 1930), 42 F. 2d 133.

United States v. Mullin (D.C.Mo., 1943), 51 Fed. Supp. 785.

In several of these cases, *Prussian v. United States* is cited with approval indicating that the interpretation placed upon the statute by the Court in the Prussian case is being followed generally.

Appellant urges that under the rule of ejusdem generis, Exhibit No. 1 cannot be included within the words of Section 495, Title 18, U.S.C.A., as "other writing." Section 495, supra, refers to any "deed, power of attorney, order, certificate, receipt, contract or other writing." These writings referred to fall in different categories of different meaning and unrelated in subject matter. The obvious and apparent purpose of Congress in enacting Section 495, supra, and its predecessors, was to protect against the forging, altering, counterfeiting or

false making of any writing for the purpose of obtaining money directly or indirectly from the United States, and consistent with that purpose Congress made use of the words "or other writing" to denote the comprehensive scope of the legislation.

ISSUE NO. II

The indictment need not set out the specifically enumerated writings included in Section 495, Title 18, U.S.C.A., to state facts sufficient to constitute a crime.

Prussian v. United States, 282 U.S. 675, 51 S. Ct. 223 and 75 L. Ed. 610.

Pina v. United States (C.C.A. 9th, 1948), 165 F. 2d 890.

Head v. Hunter (C.C.A. 10th, 1944), 141 F. 2d 449.

Johnson v. Warden (C.C.A. 9th, 1943), 134 F. 2d 166.

Goldsmith v. United States (C.C.A. 2d, 1930), 42 F. 2d 133.

United States v. Raskin (D.C.N.Y., 1943), 52 Fed. Supp. 343.

United States v. Mullin (D.C.Mo., 1943), 51 Fed. Supp. 785.

Argument

Appellant's contention that the indictment does not state sufficient facts to constitute a criminal violation of Section 495, Title 18, U.S.C.A., is premised on the supposition that this section is susceptible to the application of the doctrine of ejusdem generis (Appellant's Brief,

p. 14). Appellee, however, believes that appellant's supposition is incorrect, the incorrectness of which is presented in appellee's brief of Issue No. I.

The indictment charges the defendant "did alter, forge and counterfeit a certain writing, to-wit:" It is clear if the ejusdem generis doctrine is not applicable to Section 495, *supra*, all elements of an offense under that statute are charged and the specifically enumerated writings need not be alleged.

CONCLUSION

All rules of statutory construction are subordinated to the doctrine that Courts will construe the Act to conform with the dominating general purpose and legislative intention. The general purpose and intention of Congress in enacting the statute involved in this appeal was to protect against *any* writing if altered or forged for the purpose of obtaining or receiving money from the United States. Giving effect to this legislative purpose and intention, appellant's attack of the indictment is untenable and the judgment appealed from must be affirmed.

Respectfully submitted,

HENRY L. HESS,
United States Attorney
for the District of Oregon,

FLOYD D. HAMILTON,
Assistant United States Attorney,

JOHN R. BROOKE,
Assistant United States Attorney.